BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES T. JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S.D. NO. 492	)	
Respondent	)	Docket No. 1,011,441
	)	
AND	)	
	)	
KS. ASSOC. OF SCHOOL BOARDS	)	
W.C. FUND INC.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the October 8, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found claimant sustained an accidental injury to his knee while serving as a referee for a middle school junior varsity basketball game on December 3, 2002. The ALJ concluded the claimant's injury arose out of and in the course of his employment with respondent. Accordingly, he was entitled to medical benefits as well as payment and reimbursement of all outstanding medical bills associated with the December 3, 2002 injury.

The respondent requests review of this determination alleging claimant was acting as a volunteer at the time of his injury. Further, respondent alleges the ALJ abused his discretion in relying upon affidavits claimant offered in support of his claim and then in prematurely issuing an Order in reliance upon the contents of the affidavits before depositions of those affiants could be completed and submitted.

Claimant argues there is ample evidence upon which to conclude that claimant did, in fact, prove that his accident arose out of and in the course of his employment with respondent, independent of the evidence contained within the affidavits. Claimant also argues he was not a true volunteer but was acting at the request of his employer and under the assumption he would be paid for his work as an official.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

For the past 12 years, claimant has been employed as a shop teacher and head track coach at Flint Hills High School. During his tenure, he was generally aware of the practice of having teachers and/or coaches officiate the students' athletic games in addition to their contractual duties. Claimant testified he was aware that several of his co-workers, Mark McNemee, Mark Womack and Eric Sorum, were paid to officiate at games. In fact, before his injury claimant had, at times, served as a referee at middle school games and was compensated for his time. According to claimant, he was advised by Mark Wynn, the middle school principal and athletic director, that it was cheaper for the school district to pay its coaches or teachers rather than hiring officials from outside the district.

Before December 3, 2002, Mr. Wynn approached claimant and asked him to referee at a middle school junior high ball game. Claimant agreed to officiate and both parties agreed payment was not discussed. On December 3, 2002, claimant was acting as a referee and when he turned to run, he felt a pop in his knee. He was able to complete the game and advised Mr. Wynn of the injury. An accident report was apparently made and a claim was filed. Since that date, he has received treatment from his family practitioner and has now been referred to Dr. Do.

Respondent contends claimant was serving as a volunteer during the ball game and that there was no agreement to pay him for his services. Accordingly, respondent maintains claimant is not entitled to benefits. This refusal led to a preliminary hearing which was held on September 30, 2003. At issue was claimant's request for ongoing medical treatment as well as payment of outstanding medical bills.

In support of his claim, claimant testified and offered the affidavits of Mark McNemee, Mark Womack and Eric Sorum, each of whom are claimant's co-workers. Their affidavits were marked as an exhibit and it is unclear whether the ALJ admitted them into evidence or merely accepted them based upon an understanding that each of these individuals' depositions would be taken. After being presented with the affidavits and hearing respondent's objection to them, on the basis of hearsay, the ALJ said the following:

> Okay. Set their depositions. Shouldn't take too long. Or do them all in one shot. Mr. Wonnell, [respondent's counsel] you can appear by phone if you wish. It is up

> to you gentlemen. You can schedule them here in front of me or one of your offices or at the school. It is up to you. But set it up as quickly as you can.[1]

The Board finds, for preliminary hearing purposes, that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment.

In workers compensation litigation the burden of proof is upon claimant to establish claimant's right to an award of compensation by proving various conditions upon which claimant's right depends by a preponderance of the credible evidence.[2]

In this instance, even without considering the affidavits, the greater weight of the evidence indicates claimant was not acting as a volunteer at the time of his injury. While officiating at a middle school ball game might not have been within the express terms of his contract with respondent, it is clear that he was asked by the school principal to perform the duties of a referee on December 3, 2002. He had been asked to do this on previous occasions and believed, as was the case before, that he would be paid for this service. Even Mr. Wynn admits he did not discuss the issue of payment with claimant during this conversation. Thus, claimant had no reason to know that payment was not available for this duty. This is established by claimant's own testimony.

Although Mr. Wynn testified that he presently recruits "volunteers" to act as referees at the middle school junior varsity games and that he did not offer to pay claimant for his work at the December 3, 2002 game, the evidence is clear and uncontroverted that the policy of not paying teachers or coaches for their work as officials in middle school junior varsity games was new and implemented in the 2002-2003 school year, the same year Mr. Wynn began to serve as the middle school athletic director. Before then, teachers and coaches were paid for their services. This is consistent with claimant's understanding.

As for the issue of the affidavits, the Board finds that it is unclear whether the ALJ relied upon their contents and even if he did, the Board finds no error in that practice under these facts and circumstances. The general rule in workers compensation cases is that the ALJ and the Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard and present evidence.[3] Moreover, workers compensation proceedings are no controlled by strict rules of evidence. Evidence is more liberally admitted in workers compensation.[4]

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[1] P.H. Trans. at 5.

[2] *See* K.S.A. 44-501 (Furse 2000) and K.S.A.2002 Supp. 44-508(g).

[3] See *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 772, 921 P.2d 257 (1996).

[4] See *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

Here, the ALJ directed claimant to schedule the witnesses' depositions and for whatever reason, that was not done.[5] Without any further offer of evidence, the ALJ appropriately issued an order consistent with the principles set forth in K.S.A. 44-534a(a)(2) based upon the evidence presented at the hearing. Whether the ALJ considered the affidavits or not, this is a de novo review and the Board is not considering the affidavits. The Board finds claimant met his burden of proof and established it is more likely than not that he sustained an accidental injury arising out of and in the course of his employment.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated October 8, 2003, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2003.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[5] It is worth noting that the individuals who authored these affidavits are respondent's employees and within its control.